mental incompetency would seem less undesirable than a recurrence to the theory that ademption is controlled by the testator's intent at the time of the destruction or conversion of the gift.

DAMAGES RECOVERABLE FOR THE INFRINGEMENT OF A PATENT.—The infringement of a patent subjects the defendant to two totally dissimilar and independent liabilities. At law his obligation, like that of the ordinary tort feasor, is to compensate the plaintiff for all the injury sustained.[1] In equity, on the other hand, he is treated as a trustee who has misused trust property, and consequently must account for all the fruits of his wrongful act.[2] This distinction is in no way affected by the statutory power[3] recently vested in courts of equity to award legal damages as well as the profits made by the defendant,[4] and even now the considerations determinative of the one should not control as to the other.

In ascertaining the amount of the plaintiff's injury, little difficulty is experienced in those cases in which the patentee permits the use of his invention by the public upon the payment of a license fee or royalty, which is sufficiently established at the time of the infringement to be fairly denominated the market value of that use. Manifestly under these circumstances the only injury inflicted upon him, is the non-payment of that sum.[5] Such fee or royalty must, however, be established as a fact, and cannot be based upon a mere inference by the jury as to what would be a reasonable one under the circumstances, for otherwise it is not a sufficiently definite standard of computation to satisfy the peculiar rigor with which the courts insist upon proof of actual damages.[6] Even an established royalty has been held to be an improper measure of damages where the infringement was of short duration.[7] This result would seem to rest upon a confusion of the elements determining damages at law and profits in equity, and might well be criticised as ignoring the fact that the plaintiff had a right to insist that his invention should not be used at all except upon payment of the usual royalty. If, on the other hand, a patentee finds his profit in monopolizing the invention, it is obvious that he must prove his damages by more general evidence, such as loss of sales,[8] or reduc-

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[1]Goodyear *v.* Bishop (1861) 10 Fed. Cas. No. 5559; see Beach *v.* Hatch (1897) 153 Fed. 763.

[2]Root *v.* Railway Co. (1881) 105 U. S. 189; Tilghman *v.* Proctor (1887) 125 U. S. 136.

[3]R. S. § 4921.

[4]See Birdsall *v.* Coolidge (1876) 93 U. S. 64; Coupe *v.* Royer (1895) 155 U. S. 565. The statute simply gives a plaintiff who is properly in equity the right to elect to have his damages assessed according to legal rules, where the defendant's profits are inadequate to redress the injury sustained. See Yesbera *v.* Hardesty Mfg. Co. (1908) 166 Fed. 120.

[5]Hogg *v.* Emerson (1850) 11 How. 587; Mayor etc. *v.* Ransom (1859) 23 How. 487; Rude *v.* Westcott (1889) 130 U. S. 152; Houston, H. & S. T. Ry. Co. *v.* Stern (1896) 74 Fed. 636.

[6]See Seymour *v.* McCormick (1853) 16 How. 480; Philp *v.* Nock (1873) 17 Wall. 460, holding that damages must be actual.

[7]Birdsall *v.* Coolidge *supra;* Seymour *v.* McCormick *supra;* see Royer *v.* Schultz Belting Co. (1891) 45 Fed. 51; appeal dismissed in Royer *v.* Schultz Belting Co. (1893) 154 U. S. 515.

[8]Zane *v.* Peck (1882) 13 Fed. 475; Blake *v.* Greenwood Cemetery (1883) 16 Fed. 676; Rose *v.* Hirsch (1899) 94 Fed. 177.

tion of profits.[9] Whether in this connection he may show the amount of the defendant's profits does not appear to have been definitely settled. Although the later cases have evinced a decided tendency to exclude any consideration of this element,[10] it would seem that when coupled with other facts which show that but for the defendant's wrongful act these profits would have been realized by the plaintiff, such evidence should be considered relevant.[11]

Very different principles govern the amount of the infringer's profits in equity. In general, these profits are to be found in the advantage accruing to him as a result of the use of the patented article or process, rather than the means then open to the public and adequate to accomplish an equally beneficial result.[12] Obviously this advantage may appear not only as positive gains, but also as savings,[13] and must be determined from a consideration of the manner in which he did in fact conduct his business, as contrasted with that in which he might have conducted it.[14] Moreover it is clear that no act of the patentee can either increase or diminish those profits. The existence of a license fee,[15] or the user or non-user of the invention by the plaintiff during the period of infringement[16] must therefore be immaterial. Since, however, the plaintiff's recovery is limited to the amount actually realized from the wrongful use,[17] he must be allowed only so much of the profits as are directly traceable to the infringement. Thus where the patent covers only a part of the article, the plaintiff is under a duty to segregate that portion of the total profits which has accrued from his invention.[18] Of course, where the entire profits are attributable to the patented improvement no question of segregation can arise.[19] It has been suggested that this principle is also inapplicable where the infringement consists in the use as distinguished from the sale of a machine containing the patented improvement,[20] but in view of the fact that the defendant must account for the actual advantage which he

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[9]Yale Lock Mfg. Co. *v.* Sargent (1886) 117 U. S. 536; Boesch *v.* Gräff (1890) 133 U. S. 697.

[10]Coupe *v.* Royer *supra;* Boston *v.* Allen (1898) 91 Fed. 248.

[11]See Cowing *v.* Rumsey (1870) 6 Fed. Cas. No. 3296; Royer *v.* Schultz Belting Co. *supra.*

[12]Mowry *v.* Whitney (1871) 14 Wall. 620; Littlefield *v.* Perry (1874) 21 Wall. 207; Cawood Patent (1876) 94 U. S. 695; Locomotive Safety Truck Co. *v.* P. R. R. Co. (1880) 2 Fed. 677.

[13]Cawood Patent *supra;* Campbell *v.* James (1880) 2 Fed. 338; see Elizabeth *v.* Pavement Co. (1877) 97 U. S. 126.

[14]Cawood Patent *supra;* Thompson *v.* Wooster (1884) 114 U. S. 104; Webster Loom Co. *v.* Higgins (1890) 43 Fed. 673.

[15]Tilghman *v.* Proctor *supra.*

[16]Crosby Valve Co. *v.* Consolidated Safety Valve Co. (1891) 141 U. S. 441.

[17]Dean *v.* Mason (1857) 20 How. 198; Tilghman *v.* Proctor *supra.*

[18]Garretson *v.* Clark (1884) 111 U. S. 120; Blake *v.* Robertson (1876) 94 U. S. 728; Keystone Mfg. Co. *v.* Adams (1894) 151 U. S. 139; and see article on "Damages and Profits in Patent Causes" in 10 COLUMBIA LAW REVIEW 639.

[19]Mfg. Co. *v.* Coward (1881) 105 U. S. 253; Hurlbut *v.* Schillinger (1889) 130 U. S. 456; Plaget Novelty Co. *v.* Headley (1903) 123 Fed. 897; Westinghouse *v.* N. Y. Air Brake Co. (1905) 140 Fed. 545.

[20]Novelty Glass Co. *v.* Brookfield (1909) 170 Fed. 946.

has derived from the infringement, this distinction would seem to be unwarranted.

The court in the recent case of *Peerless Brick Mach. Co* v. *Miracle Pressed Stone Co.* (1910) 181 Fed. 526, applied the foregoing principles to a suit in equity in which it was found that the defendant, by selling the articles made by him with an infringing machine, had realized a substantial profit and had at the same time decreased the number of the plaintiff's sales. As it appeared that the plaintiff's machine was the only one then in the market which could accomplish the desired result, it was properly held that the defendant's entire profits were attributable to the infringement, and consequently could be recovered by the plaintiff, but that since a recovery could not be had for the same infringing sales both as profits of the defendant, and as damages to the plaintiff, the item of lost sales should be disallowed.

THE DOCTRINE OF ESTOPPEL AND THE LAW OF LICENSES.—The question as to how far the acceptance of a license to place a burden on another's land will enable the licensee to maintain this burden is easily answered on principle. Since the right thus acquired is in its nature a mere personal privilege, it is revocable at will[1] and any circumstance inconsistent with its continued existence[2] such as the death of either party[3] or a conveyance of the property affected[4] operates *ipso facto* to terminate the license. Although it would seem evident that any act on the part of the licensee would be ineffectual to change the fundamental nature of such a right[5] yet the courts, realizing that a logical application of the above principle would in many instances be productive of hardship, have, in such cases, attempted to find some theory upon which to declare the license irrevocable. The undesirability of permitting the creation of interests in land by informal grant has, however, deterred them from affording the full measure of protection which pure considerations of justice demand.[6]

Accordingly, whatever may have been the occasional result with respect to the extinguishment of property rights,[7] it has been consistently held that a license as such cannot operate to create an interest in land. Whenever, therefore, a licensee is to be allowed to assert a permanent interest in the property of his licensor his claim must be predicated upon the existence of a valid grant[8] rather than upon any peculiar quality of the license. This principle perhaps

[1]Wood *v.* Leadbitter (1845) 13 M. & W. 838; see Fentiman *v.* Smith (1803) 4 East 107.

[2]See Lockhart *v.* Geir (1882) 54 Wis. 133; Dark *v.* Johnston (1867) 55 Pa. St. 164; Hodgkins *v.* Farrington (1889) 150 Mass. 19.

[3]Lambe *v.* Manning (1898) 171 Ill. 612; Bridges *v.* Purcell (N. C. 1836) 1 Dev. & B. 492.

[4]Carter *v.* Harlan (1854) 6 Md. 20; Eggleston *v.* N. Y. & H. Ry. (N. Y. 1859) 35 Barb. 162.

[5]See Bryan *v.* Whistler (1828) 8 B. & C. 288; Dodge *v.* McClintock (1867) 47 N. H. 383; Foot *v.* N. H. & Northampton Co. (1854) 23 Conn. 214; Crossdale *v.* Lanigan (1892) 129 N. Y. 604.

[6]Crossdale *v.* Lanigan *supra.*

[7]Morse *v.* Copeland (Mass. 1854) 2 Gray 302; Washburn, Easements 726; *cf.* Liggins *v.* Inge (1831) 7 Bing. 682.

[8]Thompson *v.* Gregory (N. Y. 1809) 4 Johns. 81; see Nunnelly *v.* Southern Iron Co. (1894) 94 Tenn. 397.